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IN THE

Supreme Court of the United States

October Term, 1978

No. [redacted]

COMMONWEALTH OF PENNSYLVANIA

vs.

HUGH FANT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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vs.

HUGH FANT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on October 5, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at ..... Pa. ....., 391 A2d 1040 and is printed in Appendix A hereto, infra, page A-1 et seq.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 5, 1978. The jurisdiction of the Supreme Court is invoked under 28 V.S.C. Section 1257 (3), as the decision of the Supreme Court of Pennsylvania rests entirely upon its interpretation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether the Due Process required under the Fourteenth Amendment mandates that when no pre-trial identification procedures are used, all witnesses proposed to be called in a criminal prosecution to offer identification testimony must be sequestered prior to giving that testimony?

CONSTITUTIONAL AMENDMENT INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant case is a criminal prosecution for the crime of criminal homicide. An indictment was returned by the Grand Jury of Fayette County against Defendant, Hugh Fant, at Criminal Action No. 1 of 1975, charging two counts of criminal homicide.

The Defendant was tried before a judge and jury. The trial on the charges began September 3, 1975, with verdicts returned September 23, 1975, the jury convicting Defendant of two counts of murder in the third degree as that is defined in the Crime Code of Pennsylvania, Section 2502, 18 Pa. C.S. Section 2502.

The evidence shows that the deaths occurred in the early morning hours of December 15, 1974. Two men, Bruce J. Fisher and John M. Schlosky, lost their lives because of gun shot wounds suffered during an incident at the Wishing Well Lounge, German Township, Fayette County, Pennsylvania. One of the deceased, Bruce J. Fisher, was a co-owner of the lounge.

In an incident during the evening of December 14, 1974, Hugh Fant, Jack A. Rodgers and Mark Collins attempted to purchase alcoholic beverages at the bar of the lounge. As they were under the legal age for drinking in Pennsylvania, all three were denied service and instructed to leave the premises. When they refused, Mr. Fisher physically ejected them from the lounge.

Once in the parking lot, Fant began yelling obscenities. When asked by another patron of the establishment to stop because there were ladies present, an altercation began. Attempts to stop the fighting were fruitless until Mr. Fisher directed mace toward Fant, his companions, and the others involved. Fant, Collins, and

Rodgers then entered a car to leave. Before they had left the parking lot area, however, one of the occupants of the car yelled that they would be back.

In approximately one-half hour, they were back, accompanied by James Lee Smith. Fant was now armed with a rifle and Smith with a hand gun. All except Collins, who remained at the outside door, entered the lounge. Once inside, Smith asked "Which one is Bruce, where is Bruce?" Fisher approached the group, at which time Smith questioned Fant's ejection from the bar. Rodgers then struck Fisher on the head with a beer bottle. As Fisher turned to leave the group, Fant brought his rifle to waist level and fired. The first shot struck Fisher in the back and he fell to the floor. Fant continued to fire and one shot struck a patron, John M. Schlosky. Both Fisher and Schlosky died as a result of the wounds.

Testimony concerning the autopsies performed on the two bodies indicated that the cause of death for both was gunshot wounds. Defendant himself never denied shooting Fisher or further discharging his rifle; the defense offered by Fant was that as no cranial autopsy was performed on Fisher, it was possible that the blow to the head delivered by Rodgers had been fatal and that Fisher was dead before he was shot.

The jury returned verdicts of guilty in the deaths of both victims. Timely post-verdict motions were filed, raising five issues: (1) error in denying a change of venue; (2) denial of Defendant; motion to have the jury sequestered from the time of selection to the panel; (3) improperly admitting testimony of Andrew T. Haky, the funeral director who performed the initial autopsy; (4) improper admission of the testimony of the pathologist who, in part, based his opinion as to cause of death in the report of Mr. Haky; (5) an abuse of discretion in denial of a defense motion to sequester, prior to their testifying, all prosecution witnesses who would either place Fant at the scene or testify that Fant actually did the shooting.

Rulings Below

The Court of Common Pleas of Fayette County, Pennsylvania, sitting en banc, denied the motions for new trial and in arrest of judgment. Sentence was imposed on the two verdicts, Defendant being ordered to serve two consecutive terms of imprisonment of ten to twenty years each. As this was a sentence imposed on a criminal homicide conviction, appeal from the sentence was directly to the Supreme Court of Pennsylvania, §202 of the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, 17 P.S. §211.202. Such an appeal was timely filed, raising the same five issues raised on the post-verdict motions.

The Supreme Court of Pennsylvania announced its decision in the case on October 5, 1978. In that opinion, the Court, by a four to three vote, vacated the sentences and ordered a new trial. The Court considered only one issue, whether the trial court abused its discretion by refusing to order sequestation of the prosecution's identification witnesses. Two members of the Court, announcing its decision, ruled that the discretion of the Court was abused when sequestation was not ordered. The seventeen (17) witnesses who identified Fant as participating in the shooting made their first identification in open court. The Court ruled that, as there was no objective pre-trial identification procedure utilized

by the prosecution, sequestation was required to assure Defendant was afforded Due Process, as the incident identification amounted to a one-on-one confrontation between witness and accused. Two members of the Court concurred in the resulting order of a new trial.

Three Justices dissented, reading the lead opinion as penalizing the Commonwealth for failing to exercise a non-existent duty to utilize pre-trial identification procedures. The dissenting opinion also questioned the ruling as holding an identification suspect because it occurs in open court, which of recently, involves a one-on-one confrontation. The dissenters conclude by saying that such an identification is properly admissible, since it is observed by the fact finder who will ultimately determine the believability of such testimony.

It is from the order of the Supreme Court of Pennsylvania ordering a new trial in this case that review is sought.

REASON FOR GRANTING THE WRIT

I.

The decision of the Supreme Court of Pennsylvania decides a question of the interpretation of Fourteenth Amendment Due Process in a manner that is not in accord with the decisions of this Honorable Court.

In the instant case, the primary issue for resolution by the jury was the identification of the accused as the perpetrator. The contention made by Defendant, and accepted by the Supreme Court of Pennsylvania, was that the trial court committed an abuse of discretion in denying the pre-trial motion of the defense to sequester all witnesses who would offer identification testimony. Specifically, the Supreme Court of Pennsylvania ruled that the failure to sequester the witnesses resulted in the offering of identification testimony which could not be considered untainted.

Same seventeen (17) individual witnesses offered identification testimony. These witnesses included both employees and patrons of the Wishing Well Lounge, all of whom were present during the incident of December 14-15, 1974. These witnesses included same who had observed each of the three incidents in which Defendant was a participant during that time period. In every case, the witness stated that the testimony offered and the included identification was based entirely on observations made during that evening at the Lounge.

In fact, no pre-trial identification procedures were employed. None of the witnesses was shown photographs or participated in a line-up proceeding. The first proceeding at which identifications were made was dur-

ing the trial itself. The mere fact that seventeen separate witnesses all identified the accused as being present at and participating in the relevant incidents does not of necessity, taint the identifications made.

It is recognized that Due Process requires the exclusion of tainted identifications. *United States v. Wade,* 388 US 218, 87 S.Ct. 1926, 18 L Ed 2d 1149 (1967); *Simmons v. United States,* 390 US 377, 88 S.Ct. 967, 19 L Ed 2d 1247 (1968); *Neil v. Biggers,* 409 US 188, 93 S.Ct. 375, 34 L Ed 2d 401 (1972). All of these cases address testimony from witnesses who had participated *in* pretrial identifications, either photographic displays or lineups, found to be unnecessarily suggestive. The cases hold that in-court identifications may not be used unless it is shown that they are based on the witnesses' observations of the Defendant independent of the pre-trial procedures. Even if such a suggestive pre-trial procedure has been conducted, the identifications may still be admitted if an independent foundation is shown. The test involves an examination of the totality of the circumstances.

What the Supreme Court of Pennsylvania has said is that an identification may be improperly tainted, not only by overly suggestive pre-trial proceedings, but also by a failure to use some type of identification procedure prior to trial. That is an in-court identification may be tainted because the testimony of the witness contains his first identification of the accused with the taint arising simply because it occurs in court, which is essentially a one-on-one confrontation.

The Supreme Court, however, goes even further. It would appear that if but one witness were to offer identification testimony, the fact that no pre-trial identifications were made would not taint the testimony. However, if more than one witness is to testify on the issue and if none of the witnesses had participated in pre-trial procedures, then the testimony offered may be tainted from an additional source, *i.e.,* the reinforcement of subsequent witnesses identifications by the testimony of witnesses who have testified before. This, the Supreme Court ruled, violates due process, and requires sequestating the identification witnesses.

In essence, as the dissenting opinion of that Court says, the decision in the instant case puts on the prosecution an obligation to utilize pre-trial identification procedures when multiple witnesses are to testify concerning identification of the accused.

Therefore, unlike the above cited decisions of this Honorable Court, the instant case does not involve the admissibility of identification founded by suggestive and unnecessary pretrial procedures. Rather, the rationale of the Supreme Court of Pennsylvania is that no independent basis for identification testimony may be established by trial confrontation alone, to show an independent basis, the instant decision requires the use of some type of pre-trial identification procedure to test the accuracy and reliability of the identification to be offered.

Thus, the Supreme Court of Pennsylvania has rules on the basis of a due process agreement that an accused must first be identified by way of photographic array, lineup, showup, or some other efforts of identification prior to initiation of judicial proceedings. [It must be emphasized that one witness, who was the brother of Bruce Fisher and was present at the lounge for both incidents, supplied H. Fant's name to the police on the

basis of his independently picking a picture out of the year book of a high school named on a jacket worn by the accused during the incident.] Without utilizing such a procedure, no identification testimony apparently would be admissible.

Consequently, the Supreme Court of Pennsylvania ruled that due process required the sequestration of identification witnesses when more than one was to testify on that matter. Here, seventeen (17)) witnesses identified Respondent. Each described the incidents of the night in question and the basis for the proffered identification. Even though each witness testified that the basis of his testimony was his observations on the night of the crime, the Supreme Court of Pennsylvania ruled that due process was not met. Of course, none of the testimony was tainted by pre-trial procedures. Rather, it was held that the prosecution had not shown that the testimony was free from a taint arising from each witness being in the courtroom to observe the identifications made by prior witnesses. In other words, it was held that merely outlining each witness's opportunity to observe the events of the night in question and the lack of suggestive pre-trial identification procedures had not conclusively shown an independant basis for the identifications permitting admission of the testimony.

The ruling below, therefore, goes to establish what must be shown to establish an independent basis for identification testimony when no improperly suggestive procedures are used before trial. In such circumstances, the Court seems to require a showing of reliability of that testimony which goes beyond that required whenever improper pre-trial procedures are used. In its opinion, the Court directs that proof of an independent basis of a reliable identification can be shown only if, prior to trial, that identification has been tested in some type of non-suggestive procedure, e.g., a properly conducted line-up.

Such a holding is not in accord with the rulings of this Court. No requirement of conducting pre-trial identification procedures has been imposed on prosecuting offices. No such requirement is imposed even when admittedly overly suggestive and unnecessary identification procedures were utilized prior to trial tainting such testimony. *Manson v. Brathwaite,* 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d. 140(1977). There, this Honorable Court allowed a conviction to stand on the basis of the identification of the accused given by an undercover officer. The officer's testimony was admittedly tainted by his pre-trial identification of a single photograph shown him a short time after the crime. However, the testimony given by the officer also included his description of the sale of drugs from which the prosecution stemmed. From that the Court concluded that an independent basis for the identification testimony was made out, and that regardless of the taint, admission of the testimony did not violate due process.

In the instant case, the Court below in essence held that testimony such as that given by officer Glover in *Manson v. Brathwaite* was insufficient to establish an independent basis for an identification, even when there is no arguable taint in such testimony. Rather, the Supreme Court of Pennsylvania holds that due process requires some type of non-suggestive pre-trial procedure to establish such a basis, and that the failure to conduct such a procedure raises the inference of a taint

on identifications given by multiple witnesses. Such a holding goes well beyond what has heretofore been required by decisions of this Honorable Court, and the holding of the Supreme Court of Pennsylvania is, therefore, not in accord with the definition of due process established by the decisions cited above.

CONCLUSION

For the foregoing reasons, it is urged that this Honorable Court grant the petition for writ of certiorari and review the judgment and order of the Supreme Court of Pennsylvania.

Respectfully submitted,

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October Term, 1978

No. 78-1068

COMMONWEALTH OF PENNSYLVANIA

vs.

HUGH FANT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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APPENDIX A 1a

IN THE

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No. .....

COMMONWEALTH OF PENNSYLVANIA, Petitioner
vs.
HUGH FANT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee
vs.
HUGH FANT, Appellant

No. 113 March Term, 1977

Appeal from the Judgment of Sentence
of the Court of Common Pleas of
Fayette County, Pennsylvania, Criminal Division,
at Criminal Action No. 1 of 1975
dated February 11, 1977

OPINION

JUSTICE MANDERINO

Appellant Hugh Fant, a black male, was tried before a judge and jury and convicted of two counts of murder of the third degree in connection with the shooting deaths of two men in a Uniontown nightclub. Post-verdict motions were denied, and appellant was sen-

tenced to two terms of imprisonment of 10 to 20 years, the terms to run consecutively. This direct appeal followed.

Appellant raises five assignments of error, only one of which we need address here. Appellant claims he was denied due process of law when the trial court refused his request to sequester the prosecution's witnesses, some of whom placed Fant at the scene of the killings and others who testified they witnessed Fant actually do the shooting. We agree with appellant that under the circumstances of this case, in which appellant was never identified at a pretrial lineup, photographic lineup, showup, or other pretrial identification procedure, the trial court's refusal to sequester witnesses was an abuse of discretion which dictates that appellant be granted a new trial.

According to prosecution witnesses, several men were involved in a minor skirmish inside the Wishing Well Lounge in Uniontown, Pennsylvania at approximately 1:30 a.m. on December 15, 1974. Three of the men, whom prosecution witnesses identified at trial as appellant and two companions, were ejected from the nightclub. Another altercation then took place in the parking lot. The nightclub's owner, Bruce Fisher, sprayed some mace into the scuffling group in order to restore order. The three men left by automobile, vowing to return.

Shortly thereafter four men returned. Two of the men were black and two were white. One was brandishing a rifle; one carried a handgun. The four men entered the nightclub through the front door. Fisher approached the four and was struck on the head with a beer bottle. As Fisher turned and began to walk away, one of the

men shot him in the back. The same man then fired several more shots, killing one of the nightclub's patrons.

Appellant was arrested the following morning. Between the time of appellant's arrest and trial—approximately nine months—no identification procedures were utilized in an effort to have any of the prosecution's witnesses identify appellant as the person responsible for the killings at the Wishing Well Lounge. The prosecution has not offered an explanation for its failure to utilize a photographic array, to conduct a lineup or showup, or to make any other efforts to obtain an identification of appellant prior to the initiation of judicial proceedings. At the preliminary hearing, however, the record indicates that the only witnesses who testified stated that they could not identify appellant as the killer.

Rather than make an effort to have the prosecution witnesses identify appellant via some type of objective pretrial identification procedure, the prosecution chose to have these witnesses identify appellant for the first time in open court. Because defense counsel's motion to have the witnesses sequestered was denied, appellant was repeatedly identified by witnesses who had heard numerous other witnesses testify during the trial that appellant was present at the Wishing Well Lounge or was the one who fired the fatal shots. These witnesses identified appellant for the first time not from a lineup including other black males of similar physical characteristics, but while he was seated at counsel's table in open court, the only black man present, and after he had been charged with two murders. The suggestiveness inherent in these identifications of appellant is, in our view, palpably clear.

Our analysis of the present appeal must start with basic precepts fundamental to our system of criminal law. A criminal trial, at the very least, should aim at truthful fact-finding, including accurate eyewitness identifications. This is true whether the identification occurs at a pretrial lineup or within the four walls of the courtroom. For obvious reasons, all of society has an interest in accurate criminal identifications. To this end, we have required that police administrators and prosecutors adopt procedures that will give fair assurance against the dreaded consequences of misidentification. A review of this case finds such assurances completely wanting.

First, each witness identifying appellant at trial did so by way of a one-on-one confrontation. The practice of showing a suspect singly for the purposes of identification has been uniformly condemned. *See, e.g., Manson v. Braithwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Commonwealth v. Fowler,* 466 Pa. 198, 352 A.2d 17 (1976); *cf.* ALI Model Code of Pre-Arraignment Procedure, §§ 160.1 and 160.2 (1975) (identification by use of a showup or the display of only a single paragraph). The reason for this condemnation of one-on-one identifications is easily stated: An identification of a suspect from among other individuals of similar physical make-up is far more reliable, and far less suggestible, than an identification when only the accused is shown to the witness. And, "reliability is the linchpin" in determining the admissibility of any confrontation identification. *Manson v. Braithwaite, supra,* 432 U.S. at 114, 97 S.Ct. at ___, 53 L.Ed.2d at 154.

The problem of suggestiveness inherent in a one-on-one confrontation becomes more acute when the identification is made in open court. This fact was recognized in this Court's plurality opinion in *Commonwealth v. Fowler, supra,* 466 Pa. 198, 203-04, 352 A.2d 17, 19-20 (1976):

> "Trial testimony identifying one as the person observed at the crime of a crime is a one-on-one confrontation involving circumstances even more suggestive than those present at pretrial one-on-one confrontations. During the trial, the identifying witness knows that the defendant present in the courtroom has been accused, arrested, and is being tried for the crime. Prior to trial, such circumstances may not yet have occurred or may not yet be known to the witness."

In the present case, it was, of course, clear to everyone in the courtroom that appellant was the accused. The risk of misidentification is obviously much greater when an accused is picked out under these circumstances rather than from a photographic array or lineup.

It is against this background that we must examine the trial court's denial of defense counsel's request to sequester witnesses. It is true that a trial court's decision regarding sequestration of witnesses is reversible only for a clear abuse of discretion. *E.g., Commonwealth v. Hamilton,* 459 Pa. 304, 311-12, 329 A.2d 212, 215-16 (1974), *cert. denied,* 420 U.S. 981, 95 S.Ct. 1411, 43 L.Ed.2d 663 (1975); *Commonwealth v. Yount,* 455 Pa. 303, 314 A.2d 242, 250 (1974); *Commonwealth v. Kravitz,* 400 Pa. 198, 218, 161 A.2d 861, 870 (1960), *cert. denied,* 365 U.S. 846, 81 S.Ct. 807, 5 L.Ed.2d 811 (1961). We think it was an abuse of discretion not to sequester witnesses under the facts of this case.

The court's refusal to sequester witnesses only exacerbated the suggestiveness attending the in court identifications of appellant. For example, the first prosecution witness to identify appellant as the killer—one Margaret Ruehmling—did so after twelve other witnesses had testified either that they saw appellant at the Wishing Well Lounge that night, or that they saw appellant approach the establishment with a rifle. The psychological pressures that influence a witness to positively identify someone after that witness has watched twelve others identify that same person as being at the scene can be overwhelming. The trial court's decision would have been on a much different footing had some or all of the witnesses previously identified appellant at some type of fairly conducted, pre-trial identification procedure. In such a case, we have some assurance that the in-court identification is an accurate one, since it is an identification made apart from the compelling suggestibility of the trial setting.

Neither the trial court's post-verdict opinion, nor the prosecution's brief, has proffered any reason in support of the refusal to sequester witnesses. The trial court and the prosecution state only that many witnesses viewed appellant at the scene on the night of the killing. Therefore, it is argued, it was not an abuse of discretion to allow witnesses to hear other witnesses place appellant at the scene of the killings.

This justification for refusing to sequester the witnesses completely misperceives the purpose behind a trial court's authority to sequester: to prevent one witness from shaping his testimony—in this case, the identification of appellant—in accordance with testimony given by other witnesses. *See generally Commonwealth v. Turner,* 371 Pa. 417, 88 A.2d 915 (1952); VI Wigmore

on Evidence §§ 1837-1838 (Chadbourn rev. ed. 1976). Indeed, it is precisely because more than one witness will be testifying to a particular "fact" that a trial court is asked to sequester witnesses. It makes no sense to argue that it was a proper exercise of discretion to deny such a request because more than one witness testified to that "fact". Where, as here, witnesses identifying appellant did so for the first time in the highly suggestive setting of an open court; where that suggestive identification was the first time in nine months that many of the witnesses were asked if appellant was the person they saw on the night in question; and where witnesses, after the first prosecution witness testified, heard anywhere from one to sixteen other persons identify the appellant, we must agree with appellant that his conviction, based almost entirely on eyewitness testimony, was so unfairly obtained as to violate due process of law. *See, e.g., Stovall v. Denno,* 388 U.S. 293, 299, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 1205 (1967) ("it remains open to all persons to allege and prove . . . that the confrontation resulted in such unfairness that it infringed his [or her] right to due process of law").

We are not unmindful that this senseless killing took place in a crowded nightclub in front of a number of people, many of whom testified for the prosecution in this case. Facially, therefore, it might be said that the in-court identifications of appellant had an independent basis, thus obviating the need to grant appellant a new trial. *Compare Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Commonwealth v. Connolly,* — Pa. —, 385 A.2d 1342 (1978); *Commonwealth v. Watkins,* 239 Pa. Superior Ct. 144, 361 A.2d 656 (1976). We reject such reasoning in this case, for we deal here with more than simply whether or not the witnesses

could make an accurate identification. We deal here with the fundamental fairness guaranteed by the fourteenth amendment's due process clause. *United States v. Lovasco,* 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). There can be no doubt that identification procedures can be violative of due process, *e.g., Stovall v. Denno, supra, Foster v. California,* 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), and in our view, the procedure utilized in this case placed an intolerable taint on the very cornerstone of our criminal justice system, a fair trial. In such a case, a new trial must be granted, for every criminal defendant is entitled to at least that much. *See Commonwealth v. Martinolich,* 456 Pa. 136, 162-63, 318 A.2d 680, 695 (1974), and cases cited therein.

Lastly, we note that the prosecution's brief seems to argue that appellant should not be permitted to challenge the trial court's refusal to sequester because he did not move to suppress the identification evidence at a pre-trial suppression hearing. The prosecution cites no authority for this proposed requirement. The sequestration issue is separate from the identification issue. Because one does not move to suppress does not mean the right to sequestration is lost when sequestration is necessary to guarantee a fair trial. The issue of sequestration was raised at trial and in post-verdict motions. Under these circumstances appellant is not precluded from raising the issue in this appeal.

Judgment of sentence is reversed and a new trial granted.

Mr. Chief Justice Eagen and Mr. Justice Nix concurred in the result.

Mr. Justice Pomeroy filed a dissenting opinion in which Mr. Justice O'Brien and Mr. Justice Larsen joined.

DISSENTING OPINION

POMEROY, J.

The majority concludes that the lower court abused its discretion in denying a defense motion for the sequestration of witnesses and accordingly awards a new trial. In so doing, I believe that this Court not only invades the province of the trial court, but additionally penalizes the Commonwealth for failing to conduct pre-trial identification procedures when in fact no such duty exists. I respectfully dissent.

Prior to trial, appellant requested that all prosecution witnesses be sequestered because the identification of the defendant was at issue in the case. Such a motion is addressed to the sound discretion of the trial court:

> "[t]he lack of adequate roomspace, the long delays which would inevitably be caused by sequestration and other practical considerations, make sequestration of witnesses ordinarily unpractical or inadvisable, except in unusual circumstances. For the foregoing reasons, sequestration of witnesses is left largely to the discretion of the trial Judge and his decision thereon will be reversed only for a clear abuse of discretion." *Commonwealth v. Kravitz,* 400 Pa. 198, 218, 161 A.2d 861, 870 (1960) (footnote omitted).

See also Commonwealth v. Hamilton, 459 Pa. 304, 311-12, 329 A.2d 212, 215-16 (1974), *cert. denied* 420 U.S. 981, 95 S.Ct. 1411, 43 L.Ed.2d 663 (1975); *Commonwealth v. Yount,* 455 Pa. 303, 314 A.2d 242 (1974). Weighing the impracticability of sequestration against the cogency of

appellant's claim, the trial court denied the motion.* I see no abuse of discretion.

In-court identification, except in limited circumstances, necessarily involves "one-on-one" confrontation between the witness and the accused. Nevertheless, this Court has never held that an identification is suspect merely because it occurs in open court. See *Commonwealth v. Jennings,* 446 Pa. 294, 285 A.2d 143 (1971). Unlike pre-trial identification, an identification which is made during trial is by definition observed by the fact-finder. Whether the recognition of the accused by the witness has the ring of truth and certainty about it, or whether it is a faltering and hesitant one, is for the jury or judge to weigh and determine like any other evidence adduced at trial. So also are the background facts which lend verity or cast doubt upon the witnesses' ability to make a reliable identification. As Justice (now Chief Justice Eagen observed in *Commonwealth v. Jennings, supra*:

> "It is urged it was error to permit this in-court identification of Jennings because the attending circumstances were most suggestive and of the nature condemned in Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969); and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967).

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*Important in this balancing test must be the fact that appellant's motion was premised upon a consideration present in most criminal trials—the identification, in court, of the accused as the perpetrator of the crime —and there is nothing alleged to indicate that the particular facts of this case weigh in favor of sequestration. Yet the concern for the impracticability of sequestration recognized in *Kravitz* and its progeny is surely a dead letter under the rationale of the majority which is arguably applicable to virtually all trials.

> "In our view, Foster and kindred cases do not compel the conclusion that the challenged testimony was erroneously admitted. These decisions proscribe an in-court identification which is the product of an unconstitutionally tainted pre-trial confrontation. Mrs. Toland's in-court identification was not so prejudicially inspired. It was made under oath while Jennings was represented by counsel. See United States v. Monroe, 421 F.2d 644 (5th Cir. 1970); United States v. Ballard, 418 F.2d 325 (9th Cir. 1969); and, United States v. Moss, 410 F.2d 386 (3d Cir. 1969). Moreover, as disclosed by the testimony, Mrs. Toland had the opportunity of observing Jennings at close range in a well-lighted area for about ten minutes. Additionally, the mode and manner of her identification was fully explored at trial to give the triers of fact ample opportunity to assess the correctness and credibility of her testimony." 446 Pa. at 306-07, 285 A.2d at 150.

The in-court identification testimony is, of course, subject to the probing of cross-examination and of argument later to the jury. As the trial court in the instant case observed:

> "These shootings occurred while a Saturday night crowd was in this lounge. Five witnesses testified they saw defendant do the shooting; five other witnesses testified they saw him there with a gun; and seven additional witnesses said they saw defendant that night at the lounge. Identification evidence was substantial. Each witness was examined and cross-examined as to the basis of his proposed identification and his ability to observe defendant. The prosecution did establish, by clear and convincing evidence, the independent basis for their identification

of defendant. They were each subject to cross-examination."

Whether identification of a suspect by a witness is worthy of belief is a question of credibility for the jury. *See, e.g., Commonwealth v. Pitts,* 450 Pa. 359, 301 A.2d 646 (1973); *Commonwealth v. Kloiber,* 378 Pa. 412, 106 A.2d 820 (1954). When prior to trial a witness is improperly influenced and his identification therefore tainted, a defendant may prevent the use of in-court identification by that witness in order that the fact-finder not be deceived as to the source of the witness' testimony. Such was the issue in *Commonwealth v. Fowler,* 466 Pa. 198, 352 A.2d 17 (1976) (plurality opinion)—relied on instantly by the majority—which led the plurality to conclude:

> "Thus, the testimony of a witness who will point an accusing finger at the defendant during the trial, should be prohibited unless the prosecution establishes by clear and convincing evidence at a suppression hearing that the witness's proposed trial identification will be reliably based on the witness's observation at the time of the crime, and that the identification was not induced by events occurring between the witness's observations at the time of the crime and the witness's in-court identification." 466 Pa. at 204, 352 A.2d at 20.

Here, appellant does not argue that events occurring after the criminal episode and before trial influenced any of the prosecution witnesses who identified him at trial.

Equally as serious as the intrusion by this Court upon the discretion of the trial court in the conduct of the trial is the implication in the majority opinion that

the prosecution is obliged to engage in pre-trial identification procedures of one sort or another, and that it was remiss in not doing so in this case. Numerous circumstances are imaginable which might make pre-trial identification unnecessary, impossible, impracticable or worse, unreliable, and I know of no duty on the prosecution to conduct them. In light of the numerous constitutional infirmities which have been found to lurk in pre-trial identification techniques, this Court should be slow to mandate their use. I see no purpose to be served in placing upon the Commonwealth an affirmative duty to conduct prior out-of-court identification as a condition precedent to going to trial. *See United States v. Dorantes,* 471 F.2d 299 (3rd Cir. 1973); *United States v. Hill,* 449 F.2d 743 (3rd Cir. 1971); *United States v. Monroe,* 421 F.2d 644 (5th Cir. 1970); *United States v. Ballard,* 418 F.2d 325 (9th Cir. 1969); *Commonwealth v. Evans,* 460 Pa. 313, 333 A.2d 743 (1975). This is what the Court seems to be doing by today's opinion.

Mr. Justice O'Brien and Mr. Justice Larsen join this opinion.

Appendix A—Order.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
vs.
HUGH FANT, Appellant

No. 113 March Term, 1977

ORDER

AND NOW, this 5th day of October, 1978, it is ordered as follows:

Judgment of sentence Reversed. New trial granted.

BY THE COURT
SALLY MRVOS
Prothonotary